

STATE OF MICHIGAN
COURT OF APPEALS

JANE GARSIDE and LEE E. MAKIELSKI, Co-
Conservators of the Estate of ALEX MAKIELSKI,
a Minor,

UNPUBLISHED
July 23, 2002

Plaintiffs-Appellants,

v

No. 231836
Genessee Circuit Court
LC No. 99-065061-NO

ROBERT SZUKHENT,

Defendant,

and

JOSEPH MUNIZ,

Defendant-Appellee.

Before: Talbot, P.J., and Cooper and D.P. Ryan*, JJ.

PER CURIAM.

Plaintiffs appeal as of right from the circuit court's order dismissing their claims against defendant-appellee Muniz. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

The relevant facts are not in dispute. Fourteen-year-old Matthew Szukhent was playing with a "paintball" gun¹ which fired a ball into the right eye of Alex Makielski, irreparably blinding that eye. The paintball gun belonged to Matthew's uncle, Robert Szukhent, and had been stored at the home of defendant Muniz. A few weeks before Makielski's injury, Robert Szukhent agreed to let Matthew borrow the gun and called Muniz to let him know that Matthew

* Circuit judge, sitting on the Court of Appeals by assignment.

¹ The "gun" in question uses compressed carbon dioxide [CO₂] to propel .68-inch plastic balls filled with paint at speeds of up to 315 feet per second for a maximum range of 200 yards.

would come over for the gun and that it was okay to give it to Matthew. Two or three days later Matthew's mother, Patricia Szukhent, called defendant Muniz to arrange to pick up the paintball gun. Patricia Szukhent drove Matthew to Muniz's home and Muniz gave Matthew the gun. The circuit court granted summary disposition in favor of defendant Muniz under MCR 2.116(C)(10), concluding that Muniz owed no duty to Alex Makielski and that Muniz's actions were not a proximate cause of Makielski's injuries.

Plaintiffs raise two arguments on appeal: (1) that the circuit court erred by concluding that defendant Muniz owed Alex no duty not to entrust 14-year-old Matthew Szukhent with Robert Szukhent's paintball gun; and (2) that the court erred by finding no genuine issue of material fact regarding proximate cause. We find no error.

Any duty to protect others from harm caused by the negligent or criminal acts of third persons arises from a special relationship between the defendant and the injured party. *Buczowski v McKay*, 441 Mich 96, 103; 490 NW2d 330 (1992). Plaintiffs have not shown any relationship between defendant Muniz and Alex which would give rise to a duty to protect him from Matthew Szukhent's negligence. Nor does the fact that Muniz could have foreseen that Matthew might misuse the paintball gun, by itself, give rise to a duty. *Buczowski*, supra at 101.

The undisputed facts show that Muniz gave Matthew Szukhent the uncharged paintball gun at the behest of the gun's owner and Matthew's mother while Matthew was accompanied by his mother. Muniz's actions "merely provided the condition ... affording opportunity" for Matthew's negligence to produce the injury, and cannot be considered a proximate cause of Alex Makielski's injury. *Singerman v Municipal Service Bureau, Inc*, 455 Mich 135, 145; 565 NW2d 383 (1997).

Affirmed.

/s/ Michael J. Talbot
/s/ Jessica R. Cooper
/s/ Daniel P. Ryan